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CHIAN SWEE ONG

v.

PP

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDDIN SHAH JCA

HASAN LAH JCA

JEFFREY TAN JCA

[CRIMINAL APPEAL NO: B-05-44-2006]

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19 OCTOBER 2009

CRIMINAL LAW: Penal Code - Section 300 - Murder - Ingredients - Intention to cause bodily injury - Sufficient in the ordinary course of nature to cause death - Death of a human being - Penal code, s. 46 - Victim unidentifiable, whether material - Whether sufficient for prosecution to prove death of a human being and not a particular identifiable person

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CRIMINAL LAW: Penal Code - Section 300 - Murder - Defence - Provocation - Exception 1 - Whether accused deprived of power of self control by grave and sudden provocation - Whether strictly an objective test - Whether reasonable man (belonging to same class of society as accused) placed in similar situation would lose self control - Whether victim's conduct amounted to grave and sudden provocation - Whether accused ought reasonably not to have lost his self control when victim rejected and mocked him - Client/prostitute relationship between accused and victim, whether a material consideration

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CRIMINAL PROCEDURE: Police investigation - Caution-statement - Whether caution properly administered to accused - Whether trial judge right in admitting caution-statement - Recording officer recorded in caution-statement that accused indicated that he understood caution - Whether sufficient - Criminal Procedure Code, s. 113(1)(a)(ii), whether complied with

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CRIMINAL PROCEDURE: Trial - Close of prosecution's case - Prima facie case - Maximum evaluation of prosecution's evidence, whether conducted by trial judge - Cumulative effect of circumstantial evidence against accused - Whether trial judge correct in ruling prima facie case made out

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The accused was charged under s. 300 Penal Code for the murder of a prostitute from Uzbekistan ('Venera') with whom he had been having a relationship. The accused had surrendered himself to the police four days after the incident and a caution-statement was recorded from him under s. 113 Criminal Procedure Code ('CPC'). According to the accused, he had fallen in love with Venera and had proposed to marry her; and on the day of the incident, he had professed his undying love for her but she had rejected, mocked and ridiculed him. Incensed, the accused then stabbed Venera to death. At the conclusion of his trial, the accused was found guilty, convicted and sentenced to death under s. 302 Penal Code.

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Before the Court of Appeal herein, counsel for the accused attacked his conviction on the grounds that: (1) the prosecution had failed to make out a *prima facie* case against the accused; and (2) the accused had established the defence of grave and sudden provocation under Exception 1 of s. 300 Penal Code. With respect to ground (1) it was contended that: (i) the caution administered to the accused was defective for not employing the words "... or to answer any question, but anything you say, whether in answer to a question or not ..." as was required under the old s. 113(1)(a)(ii) CPC, and that as such, the trial judge ought not to have admitted the caution-statement in evidence; and (ii) the trial judge did not subject the evidence and credibility of the prosecution's witnesses to a maximum evaluation to determine whether a *prima facie* case had been made out against the accused.

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Held (dismissing the appeal)

Per Hasan Lah JCA delivering the judgment of the court:

- (1) The caution, as stated in the caution-statement, was in compliance with s. 113(1)(a)(ii) CPC. The recording officer recorded in the caution-statement that the accused replied indicating that he understood the caution that was read to him. Thus, there was evidence to show that a proper caution as prescribed under s. 113(1)(a)(ii) CPC had been administered to the accused before the recording officer recorded his statement. As such, the caution-statement was properly admitted in evidence by the trial judge. (paras 26-32)

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- A (2) The trial judge had examined and analysed the evidence of the prosecution's witnesses on the basis of a 'maximum evaluation' consistent with the principles laid down in *Looi Kow Chai & Anor v. PP* CA (holding no. 3, per Gopal Sri Ram JCA). On the contrary, the evidence of the prosecution's witnesses was not challenged by the defence. The prosecution had proved that the accused was the sole occupant of the house in which Venera was found dead. (para 35)
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- C (3) Although the deceased's identity could not be ascertained by the prosecution (due to decomposition), there was evidence from the accused that the deceased was Venera. Further, a photostat copy of a passport (Uzbekistan) bearing the name of Venera was also found near the deceased. In any case, s. 300 Penal Code provides that 'culpable homicide is murder' where 'death is caused' under any one of the circumstances stated therein, and s. 46 thereof defines 'death' as 'the death of a human being'. What is required to be proved under s. 300 Penal Code is the death (murder) of a human being. (para 39)
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- E (4) The cumulative effect of all the circumstantial evidence lead to the one and only irresistible conclusion, namely, that the accused murdered Venera. The trial judge was therefore right in ruling that a *prima facie* case had been made out against the accused. (paras 36, 37, 38 & 40)
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- G (5) For the accused to succeed in his defence under Exception 1 of s. 300 Penal Code, he would have to show, on a balance of probabilities, that he caused Venera's death "whilst deprived of the power of self control by grave and sudden provocation". And whether the provocation was grave and sudden enough to prevent the offence from amounting to murder was a question of fact. (paras 42, 43 & 44)
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- I (6) It was the finding of the trial judge that: (i) the relationship as between Venera and the accused was merely that of a prostitute and a client; (ii) the accused's loss of his self control was unreasonable, when he ought reasonably to have exercised the same degree of self control as any other ordinary person in the circumstances of a client/prostitute relationship; (iii) the accused had stabbed Venera whilst in a self-triggered state of irrational anger and disillusionment; (iv) Venera's conduct in ridiculing and mocking the accused, and her rejection of his marriage

proposal, could not, objectively and reasonably, be construed as provocation; (v) on a balance of probabilities, the accused was not even “deprived of the power of self control”. The trial judge was right in his conclusion that the alleged acts of provocation by Venera could not constitute ‘grave and sudden provocation’ within the meaning of Exception 1 of s. 300 Penal Code. His findings were correct and beyond reproach; they should not be disturbed. (paras 45, 46, 47, 48)

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[Decision of High Court affirmed.]

Bahasa Malaysia Translation Of Headnotes

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Tertuduh telah dituduh di bawah s. 300 Kanun Keseksaan kerana membunuh seorang pelacur dari Uzbekistan (‘Venera’) setelah menjalin suatu perhubungan dengannya. Tertuduh telah menyerah diri kepada polis empat hari selepas kejadian dan satu kenyataan beramaran telah direkodkan darinya di bawah s. 113 Kanun Tatacara Jenayah (‘KTJ’). Menurut tertuduh, beliau telah jatuh cinta dengan Venera dan telah melamarnya; dan pada hari kejadian, beliau telah melafazkan perasaan cintanya kepada Venera tetapi Venera telah menolak, serta telah mencaci dan mengejeknya. Merasa amat marah, beliau kemudian menikam Venera sehingga mati. Di penutup perbicaraan, tertuduh telah didapati bersalah, disabit dan dihukum mati di bawah s. 302 Kanun Keseksaan.

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Di hadapan Mahkamah Rayuan di sini, peguam tertuduh mencabar pensabitan atas alasan bahawa: (1) pendakwaan gagal membuktikan suatu kes *prima facie* terhadap tertuduh; dan (2) tertuduh telah berjaya membangkitkan pembelaan bangkitan marah besar dan mengejut di bawah Pengecualian 1 s. 300 Kanun Keseksaan. Berhubung alasan (1), ianya diujahkan bahawa: (i) amaran yang dibacakan kepada tertuduh cacat kerana tidak menggunakan perkataan “... atau bagi menjawab mana-mana soalan, tetapi apa-apa yang kamu katakan, sama ada dalam menjawab soalan atau sebaliknya ...” seperti yang dikehendaki oleh s. 113(1)(a)(ii) KTJ yang lama, dan bahawa, oleh kerana itu, hakim bicara tidak seharusnya menerima-masuk kenyataan beramaran sebagai keterangan; dan (ii) hakim bicara gagal menghadapkan keterangan dan kebolehpercayaan saksi-saksi pendakwaan kepada suatu penilaian maksima bagi menentukan sama ada suatu kes *prima facie* telah dibuktikan terhadap tertuduh.

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A Diputuskan (menolak rayuan)**Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:**

- (1) Amaran, seperti yang tercatat dalam kenyataan beramaran, telah mematuhi s. 113(1)(a)(ii) KTJ. Pegawai perakam telah merakam di dalam kenyataan beramaran bahawa tertuduh telah menjawab soalan, sekaligus menunjukkan bahawa tertuduh memahami amaran yang dibacakan kepadanya. Adalah jelas bahawa wujud keterangan yang menunjukkan bahawa suatu amaran yang teratur selaras dengan kehendak s. 113(1)(a) KTJ telah diberi kepada tertuduh sebelum pegawai perakam merakamkan percakapannya. Kenyataan beramaran, dengan itu, telah diterima-masuk dengan teratur oleh hakim bicara.
- (2) Hakim bicara telah memeriksa dan menganalisa keterangan saksi-saksi pendakwaan berdasarkan ‘penilaian yang maksima’ dan itu adalah konsisten dengan prinsip-prinsip seperti yang dibentangkan di dalam *Looi Kow Chai & Anor v. PP* (keputusan no. 3, oleh Gopal Sri Ram HMR). Di sebalik itu, keterangan saksi-saksi pendakwaan juga telah tidak dicabar oleh pembelaan. Maka pendakwaan telah membuktikan bahawa tertuduh adalah penghuni tunggal rumah di mana Venera dijumpai mati.
- (3) Walaupun identiti si mati tidak dapat dikenalpasti oleh pendakwaan (kerana telah reput), terdapat keterangan dari tertuduh bahawa si mati adalah Venera. Selain itu, salinan fotostat satu pasport (Uzbekistan) milik seorang Venera telah juga dijumpai berdekatan si mati. Walau apapun, s. 300 Kanun Keseksaan memperuntukkan bahawa ‘homisid salah adalah bunuh’ di mana ‘kematian berlaku’ dalam mana-mana keadaan yang dinyatakan di situ, sementara s. 46 Kanun mentakrifkan ‘kematian’ sebagai ‘kematian seorang manusia’. Maka apa yang perlu dibuktikan di bawah s. 300 Kanun Keseksaan adalah kematian (pembunuhan) seorang manusia.
- (4) Kesan kumulatif kesemua keterangan ikut keadaan telah membawa kepada satu-satunya konklusi tidak dapat tidak, iaitu bahawa tertuduh telah membunuh Venera. Oleh itu hakim bicara betul bilamana memutuskan bahawa suatu kes *prima facie* telah dibuktikan terhadap tertuduh.
- (5) Untuk berjaya dalam pembelaan di bawah Pengecualian 1 s. 300 Kanun Keseksaan, tertuduh perlu membuktikan, atas imbalan kebarangkalian, bahawa beliau menyebabkan kematian Venera

“semasa kehilangan kawalan diri disebabkan oleh bangkitan marah besar dan mengejut”. Dan, sama ada bangkitan marah itu sebegitu besar dan mengejut sehingga boleh menghalang kesalahan menjadi satu jenayah bunuh adalah merupakan persoalan fakta.

- (6) Adalah menjadi dapatan hakim bicara bahawa: (i) hubungan di antara Venera dan tertuduh hanyalah di antara seorang pelacur dengan pelanggan; (ii) kehilangan kawalan diri tertuduh adalah tidak munasabah, di mana beliau seharusnya dapat mengawal dirinya dengan secara munasabah seperti yang dikehendaki dari seorang orang biasa lain dalam suasana perhubungan seorang pelanggan dengan seorang pelacur; (iii) tertuduh telah menikam Venera dalam keadaan marah dan kecewa yang tidak rasional yang dibangkitkan sendiri olehnya; (iv) kelakuan Venera dalam menghina dan mengejek tertuduh, serta penolakannya terhadap hasrat tertuduh untuk mengahwininya, secara objektif dan munasabahnya, tidak boleh ditafsirkan sebagai bangkitan marah; (v) Atas imbalan kebarangkalian, tertuduh tidak mengalami “kehilangan upaya untuk mengawal diri”. Hakim bicara betul dalam rumusannya bahawa perbuatan Venera yang didakwa sebagai provokasi itu bukanlah suatu ‘bangkitan marah besar dan mengejut’ seperti yang dimaksudkan oleh Pengecualian 1 s. 300 Kanun Keseksaan. Dapatan-dapatan beliau adalah betul dan sama sekali tidak boleh dipersalahkan; maka dapatan-dapatannya tersebut tidaklah boleh diganggu.

[Keputusan mahkamah Tinggi disahkan.]

Case(s) referred to:

Bala Matik v. PP [2006] 2 CLJ 229 CA (*refd*)

Chan Chwen Kong v. PP [1962] 28 MLJ 307 (*refd*)

Chow Kok Keong v. PP [1998] 2 CLJ 469 FC (*refd*)

Dato Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 (*foll*)

Dato’ Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC (*refd*)

Francis Anthonysamy v. PP [2005] 2 CLJ 481 FC (*dist*)

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA (*foll*)

Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC (*foll*)

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC (*refd*)

Poon Heong v. PP [1949] 1 LNS 59 (*refd*)

PP v. Badrulsham Baharom [1987] 1 LNS 72 (*refd*)

A Legislation referred to:

Criminal Procedure Code, s. 113(1)(b)(ii)
Dangerous Drugs Act 1952, s. 37A(1)
Emergency Regulations 1948, reg. 33
Penal Code, ss. 46, 300(c), 302

B *For the appellant - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co*

For the respondent - Melissa Mohd Akhir DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-78-2004]

C *[Editor's note: For a critical appraisal of the 'objective test' in the partial defence of provocation, please see the judgment of Murphy J in Moffa v. The Queen [1977] 138 CLR 601 at 627. Please see also <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2> for a critique of the objective test in the 1997 Report of the Law Reform Commission of New South Wales.]***D** *[Editor's note: For the High Court judgment, please see PP v. Chian Swee Ong [2006] 4 CLJ 662.]*

Reported by Gan Peng Chiang

E**JUDGMENT****Hasan Lah JCA:****F Introduction**

[1] The appellant was charged under s. 302 of the Penal Code. He was convicted and sentenced to death. We heard his appeal on 25 May 2009 and dismissed it. We now give our reasons.

G **[2]** The original charge preferred against the appellant was as follows:

H Bahawa kamu pada 13hb Disember 2002, di antara jam lebih kurang 5.00 pagi, di No. 11A, Jalan USJ 13/5B, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah melakukan kesalahan membunuh, iaitu menyebabkan kematian ke atas Venera Ziatdinova (Passport No. CA 1713998) dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

I **[3]** At the close of the case for the prosecution the charge against the appellant was amended as follows:

Bahawa kamu pada 13 Disember 2002, pada jam lebih kurang 5.00 pagi, di No. 11A, Jalan USJ 13/5B, di dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan telah melakukan kesalahan membunuh, iaitu telah menyebabkan kematian seorang manusia yang mana identitinya tidak dikenalpasti dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

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[4] The said amended charge differed from the original charge only to the extent that the victim was identified by name in the original charge but in the amended charge the identity of the victim was not ascertained.

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Facts Of The Case

[5] The material facts of the case as could be gathered from the notes of the proceedings and the facts as found by the learned High Court judge are as follows. On 17 December 2002 at about 6pm L/Kpl R.A. Hirudhayaddass (PW2) received a call from one Mr. Lee (the appellant's counsel) who informed him that a Chinese lady (PW6) had brought her brother who allegedly had committed a crime. Within 5 minutes after that PW2 proceeded to a car-wash centre at Jalan Dato Hamzah in Klang and upon his arrival he was approached by PW6 and the appellant. PW6 told PW2 that the appellant had committed a crime and that the appellant was his brother.

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[6] PW2 examined the appellant's body and found there was an injury on his left chest which had been treated. PW2 also observed there were scratch marks on the appellant's hand. PW2 arrested the appellant and brought him back to Balai Polis, Klang and handed him to ASP Mohd Sukri bin Kamar (PW4).

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[7] At the Balai Polis Klang the appellant handed over a bunch of keys to PW4 and the keys were for a house at No. 11A, Jalan USJ 13/5B ("the said house"). PW4 proceeded to the said house with the appellant. When they arrived there they were met by Insp. Jamil bin Osman (PW5) who was already there. The said house was a double-storey terrace house. The windows of the house and the front door were locked. PW4 gave the keys to PW5 who then opened the front door with one of the keys.

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[8] PW5 saw the body of a nude female in the hall. PW5 then informed ASP Ahmad Fauzi bin Mohamad Zin, Senior Investigating Officer, IPD Shah Alam (PW14) about the discovery.

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- A [9] PW14 went to the said house and entered the said house together with PW5. Inside the said house PW14 saw a nude body lying on a mattress on the floor in the hall. On a comforter, near the dead body, PW14 found a dagger with its sheath (exhs. P11 and P10), a box of tissue (exh. P24A), a pair of spectacles and its case (exh. P25A and P25B) and several other items. Near the toilet he found a blouse, a brassier, a panty and a pair of jeans. In a plastic bag, near the toilet, SP14 found a photostat copy of a passport under the name of “Venera Ziatdinova” from Uzbekistan (exh. P29).
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- C [10] PW14 was not 100% sure that the dead body was in fact that of “Venera Ziatdinova” named in exh. P29 as it was highly decomposed. There was no identification or verification of the name by any possible relatives of the deceased. The Uzbekistan Embassy confirmed that a passport had been issued to one “Ziatdinova” and she was an Uzbekistan citizen. PW14 did not find any evidence of the house having been broken into.
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- E [11] On 18 December 2002 Dr. Mohammad Shafie bin Othman @ Osman (PW9) performed a post-mortem on the said body at Tengku Ampuan Rahimah Hospital, Klang. PW9 testified that the body was that of a female, decomposed and maggot infested. He estimated the death to have occurred between 3 to 10 days prior to the date of post-mortem. According to PW9 the cause of death was stab wounds on the chest. He prepared a post-mortem report (exh. P8). He testified that there were 11 stab wounds on the body of the deceased, and 5 of them had penetrated the chest wall. He also testified that the stab wounds could have been inflicted with a weapon like exh. P11.
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- G [12] Primulapathi a/l Jaya Krishnan (PW13), the government chemist, testified that the dagger (exh. P11) had blood stains which matched the DNA profile of the deceased. PW13 also found that the blood stains on the hand phone, the spectacle and the jeans (which were recovered by PW14 in the living room of the said house) matched the DNA profile of the appellant.
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- I [13] On 18 December 2000 at about 3.50pm, K/I Ang Hock Ling (SP10) recorded a cautioned statement under s. 113 Criminal Procedure Code from the appellant. The cautioned statement was admitted and marked as exh. P16 and its transcript was marked as P16T after counsel for the appellant did not object to it.

[14] At the close of the prosecution's case learned counsel for the appellant elected not to make a submission of no case to answer, as he was satisfied, on the evidence adduced by the prosecution, and having had the opportunity to read the written submission of the learned deputy public prosecutor, the prosecution had in fact made out a *prima facie* case on the amended charge.

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[15] The learned High Court judge ruled that the prosecution had made out a *prima facie* case against the appellant.

The Defence

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[16] The appellant elected to give evidence on oath. In his evidence he said that he met a female Russian, known as Sarah to him, at the Spa Liza De Inn, Petaling Jaya in August 2002. He knew that her name in her passport was Venera Ziatdinova. When the appellant first met Sarah there she was working as a prostitute, with the dignified job designation of GRO (Guest Relations Officer). He became one of her clients. There were times when he took her out for her service. He either took her to a hotel or to his house to have sex.

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[17] He began to fall in love with Sarah. He had proposed marriage to her in October 2002 and she agreed to marry him and told him to wait.

[18] In November 2002 Sarah started working in a different entertainment centre, known as Kim Lady, in Puchong as a GRO. He said he went daily to Kim Lady, after his work, to see Sarah as his feelings for her became more intense.

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[19] On 12 December 2002, the appellant went to see Sarah at Kim Lady at about 8pm. On that day he had proposed marriage to her and requested her to stop working in order to marry him. Sarah got angry with him and he slapped her. Sarah retaliated and slapped him. The appellant then returned home but went back again to Kim Lady at about 3am (on 13 December 2002). He took Sarah to his house ie, the said house, and they arrived at the said house at about 4am.

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[20] At his house he expressed his feelings and love for her, and had sex with her, that morning, in the hall of his house. He told her that, he was willing to sacrifice his life for her. He then swallowed 19 "UPHAMOL" pills in front of her in order to prove

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- A to her, he meant what he had said. He claimed Sarah laughed at him when he swallowed the pills. He then took out a dagger (exh. P11) and cut his hand 4 or 5 times with it, in front of Sarah. Again, the appellant claimed Sarah laughed at him and accused him of having cheated her, as it was all a mere act by the appellant.
- B Sarah told him that she had come to Malaysia, not because of her love for him, but to earn money and she wanted to earn more money. All along she had been good to him because of the monetary return to her from her sexual services to him. The appellant said he had spent about RM20,000 for Sarah's sexual
- C services to him.

- [21] The appellant testified that upon seeing and hearing Sarah's cold, humiliating and mocking response to his expression of love for her, he lost control of himself. He then stabbed Sarah with the
- D knife which was in his hand. Sarah attempted to defend herself using her hand and she broke his spectacles. The incident happened very fast and he was not sure what really happened. Sarah fell on the floor. The incident took place in the hall.

- E [22] The appellant testified that he did not plan to murder Sarah when he brought her to his house on 13 December 2002. He surrendered himself to the police because he had committed an offence and wanted to be responsible for that.

Grounds Of Appeal

- F [23] At the hearing of the appeal before us, learned counsel for the appellant relied on two main grounds of appeal and they are as follows:

- G (a) the prosecution had failed to make out a *prima facie* case against the appellant;
- (b) the appellant had established the defence of grave and sudden provocation.

H Decision Of The Court On Appeal

- [24] On the first issue learned counsel for the appellant submitted that the cautioned statement of the appellant (exh. P16) was wrongly admitted in evidence by the learned High Court judge. It was contended that the caution administered under s. 113 of the
- I Criminal Procedure Code by PW10, the recording officer, was

defective in that it did not include the phrase "... or to answer any question, but anything you say, whether in answer to a question or not ...". In support of that learned counsel for the appellant cited the following cases:

(a) *Poon Heong v. Public Prosecutor* [1949] 1 LNS 59;

(b) *Public Prosecutor v. Badrulsham Baharom* [1987] 1 LNS 72;

(c) *Francis Anthonysamy v. PP* [2005] 2 CLJ 481.

[25] With regard to the concession made by the defence counsel in the High Court on the admissibility of exh. P16 learned counsel submitted that the concession made therein could be re-opened for further argument on the ground that the evidence had shown that s. 113 of the Criminal Procedure Code was not complied with. Two cases were cited in support of that proposition and they are:

(a) *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469;

(b) *Parlan Dadeh v. PP* [2009] 1 CLJ 717.

[26] We would deal with these issues now. We agree with the submission of learned counsel for the appellant that notwithstanding the concession made by the defence counsel the learned High Court judge must be satisfied that the provision of s. 113 of the Criminal Procedure Code was complied with before admitting exh. P16 as evidence for the prosecution. It is trite law that in a criminal case the burden lies with the prosecution to prove its case beyond reasonable doubt. With regard to the caution required under the old s. 113(1)(a)(ii) of the Criminal Procedure Code the court must be satisfied that the caution that was administered was as prescribed or contained words to the like effect.

[27] In *Poon Heong v. Public Prosecutor* (*supra*) the Court of Appeal held the omission of the phrase "or to answer any question ... whether in an answer to a question or not" in reg. 33 of the Emergency Regulations 1948 (which is in *pari materia* with s. 113 of the Criminal Procedure Code) in the caution administered by the recording officer rendered the cautioned statement inadmissible.

[28] In *Public Prosecutor v. Badrulsham bin Baharom* (*supra*) Lim Beng Choon J followed the decision in *Poon Heong*'s case and held that the omission of the words "to answer any question" in the caution administered by the recording officer under the proviso to

- A s. 37A(1) of the Dangerous Drugs Act 1952 (in *pari materia* with s. 113 of the Criminal Procedure Code) rendered the caution defective in law.

B [29] In *Francis Anthonymsamy v. PP (supra)* the evidence of the recording officer in respect of the caution that he administered was only that he read the caution under s. 113 of the Criminal Procedure Code. The actual words of the caution that was administered are as stated in the cautioned statement itself. At p. 493 the Federal Court, through Augustine Paul JCA, said:

- C ... It follows that in the absence of any evidence by the recording officer of the actual words of the caution that was administered evidence of such words in the cautioned statement cannot be used to supplement the deficient evidence. **In any event he did not say that the caution that he read is as recorded in the cautioned statement.** (emphasis added.)
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The result is that there is no evidence before the court in order to be “satisfied” whether the caution that was administered is as prescribed or contain words to the like effect.

- E [30] In the present case no trial – within – trial was held to determine the admissibility of the appellant’s cautioned statement as it was not objected to by the defence. In his evidence SP10, the recording officer, said:

- F Sebelum merakamkan percakapannya, saya ada memberi amaran kepadanya. Amaran tersebut “adalah menjadi kewajipan saya untuk memberi amaran kepada kamu apa-apa kamu ceritakan kepada saya akan menjadi satu keterangan di Mahkamah”. Saya ada memberitahu beliau dalam amaran tersebut bahawa beliau tidak diwajibkan untuk menyatakan apa-apa. Beliau faham amaran itu.

- G [31] In the notes of the proceedings at p. 47 of the appeal record it was recorded by the learned High Court judge that SP10 read out the contents of exh. P16 in open court. In the second page of the cautioned statement (exh. P16) SP10 recorded as follows:

- H ... saya telah membacakan amaran di dalam Bahasa Malaysia di bawah s. 113 KAJ yang berbunyi seperti berikut:

- I Adalah menjadi kewajipan saya untuk memberi amaran kepada kamu bahawa kamu tidaklah diwajibkan menyatakan sesuatu atau menjawab apa-apa soalan, tetapi apa-apa jua yang kamu nyatakan, samada sebagai menjawab sesuatu soalan atau tidak boleh diberi sebagai keterangan.

[32] It is to be noted that the caution as stated in the cautioned statement is in compliance with s. 113 of the Criminal Procedure Code. PW10 recorded in exh. P16 that the appellant replied that he understood the caution read to him by PW10. As such we are of the view that there are evidence to show that the proper caution as prescribed under s. 113 of the Criminal Procedure Code was administered by PW10 before recording the statement from the appellant. We are therefore satisfied that exh. P16 had been properly admitted by the learned High Court judge.

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[33] Learned counsel for the appellant also submitted that the learned High Court judge appeared not to have examined the evidence of the prosecution witnesses to a maximum evaluation to decide on their credibility to determine whether a *prima facie* case had been made out. In this connection learned counsel referred to the decision of this court in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 where it was held *inter alia* that:

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Under s. 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no *prima facie* case has been made out, and the accused is entitled to an acquittal.

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[34] The other complaint made by learned counsel for the appellant before us was that the learned High Court judge took into consideration the evidence of PW4, ASP Mohd Sukri bin Kamar, who testified that the appellant informed him that he had a female friend from Uzbekistan and that based on the information given by the appellant and guided by the appellant he (PW4) proceeded to the said house. It was the contention of learned counsel for the appellant that the evidence was inadmissible. Furthermore the learned High Court judge did not direct his mind to the amended charge which says "menyebabkan kematian seorang manusia, yang mana identitinya tidak dikenalpasti (caused the death of someone whose identity was not ascertained)."

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- A [35] We have carefully considered the grounds of judgment of the learned High Court judge. In our view the learned High Court judge had examined and analysed the relevant evidence of the witnesses for the prosecution to a maximum evaluation in accordance with the principle as stated in *Looi Kow Chai's* case. It must be noted that the evidence of the witnesses for the prosecution was not challenged by the defence. The learned High Court judge had carefully set out the relevant evidence of the witness for the prosecution which were not challenged in his grounds of judgment. With regard to the contention that part of the evidence of PW4 is inadmissible it is to be observed that without those evidence the prosecution through the evidence of PW1 and PW6 had proved that the appellant was the sole occupant of the said house.
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- D [36] It is clear that without exh. P16 the prosecution had to rely on the circumstantial evidence to prove its case against the appellant. It is trite law that the prosecution must show that the cumulative effect of all the circumstantial evidence leads to the only irresistible conclusion that the appellant committed the crime. With regard to this Abdoolcader FJ made the following observation in *Dato Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101:
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- F Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors. v Public Prosecutor* (45)).
- G In *Chan Chwen Kong v. Public Prosecutor* [1962] 28 MLJ 307 Thomson CJ said at p. 307:
- H In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not, only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?
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[37] It is therefore important at this stage to look at the circumstantial evidence adduced by the prosecution in this case as found by the learned High Court judge to see whether this test has been satisfied in the case against the appellant. A dead body was found inside the said house after the appellant brought the police to the said house. The evidence given by the appellant's sister and his neighbour showed that the appellant was the sole occupant of the said house. The police obtained the keys to the said house from the appellant.

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[38] In the living room inside the said house the police recovered several material items such as the murder weapon (exh. P11), a Nokia-brand hand phone (exh. P19A), a JAWS-brand black bow (exh. P20A), a box of tissues beside the dead body (exh. P24A), a pair of spectacles and its case (exh. P25A) and near the toilet PW5 recovered several items including a pair of jeans and a photostat copy of an Uzbekistan passport in the name of "Venera Ziatdinova" (exh. P29). It is to be observed that the blood on the murder weapon and the tissues were found to have generated from the deceased's body whilst the hand phone, the black box, the spectacles and the jeans all bore the appellant's blood. SP9 who performed a post-mortem on the deceased body testified that the body was of a woman who was nude. According to PW9 there were 11 stab wounds, 5 of which had penetrated the chest cavity and 6 were superficial. There were numerous defensive wounds on both of the deceased's hands and arms. The 5 stab wounds that had penetrated the chest cavity had penetrated both sides of the deceased's lung structure and her heart. These injuries were found to be the cause of her death. These wounds were consistent with injuries caused by a knife like exh. P11. In our view the injuries caused by the stab wounds that had penetrated both sides of the deceased's lung structure and her heart were sufficient in the ordinary course of nature to cause her death. PW10 who examined the appellant's body on 18 December 2002 before he recorded the cautioned statement from the appellant testified that there were injuries to the appellant's body ie, "11 bekas tikaman kecil." PW2, who arrested the appellant on 17 December 2002, found there was an injury on the appellant's left chest and scratch marks on the appellant's hand.

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[39] One thing peculiar about the amended charge against the appellant is that the victim's identity was not ascertained by the prosecution. The appellant was charged with the murder of a human being whose identity was not ascertained. PW14, the investigating

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- A officer could not determine whether the dead body was in fact the body of “Venera Ziatdinova.” The learned High Court judge did consider this aspect of the prosecution evidence in his grounds of judgment. In our view, notwithstanding the fact that the identity of the deceased was not ascertained by the witnesses for the
- B prosecution the facts remain that a human being had been killed. Section 300 of the Penal Code provides that culpable homicide is murder where death is caused under any one of the circumstances stated therein and s. 46 of the Penal Code defines death “as the death of a human being”. What is required to be proved under
- C s. 300 of the Penal Code is the death of a human being. This was proved by the prosecution. In any event, at the close of the entire case, with the evidence of the appellant that the victim was Sarah who was also known to him as Venera Ziatdinova and with the recovery of a photostat of a passport in the name of Venera
- D Ziatdinova near the body, there could be no doubt that the deceased was indeed Venera Ziatdinova.

- [40] Having carefully considered the evidence adduced by the prosecution and the submissions made by the parties we are satisfied that, even without exh. P16, the cumulative effect of all the circumstantial evidence in the present case leads us to the only irresistible conclusion that it was the appellant who murdered the deceased. As such it is our finding that the learned High Court judge had not misdirected himself in law and in facts in deciding
- E that the prosecution had made out a *prima facie* case against the appellant for the offence of murder within s. 300(c) of the Penal Code.
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- [41] We now deal with the appellant’s defence which is the appellant’s second ground of appeal. It is clear from his evidence the appellant had tried to raise the defence of grave and sudden provocation. In his evidence, at p. 91 of the appeal record, he said:
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- H Selepas dengar apa yang Sarah kata saya berasa marah dan masa itu saya telah hilang kawalan diri saya dan perasaan saya dan saya telah menikam beliau dengan pisau dalam tangan saya itu. Beliau cuba membela diri dengan cara menghalang dengan menggunakan tangan beliau dan beliau telah memecahkan cermin mata saya. Kejadian ini berlaku terlalu pantas dan saya sendiri tidak pasti kejadian yang sebenar.

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[42] Exception 1 to s. 300 of the Penal Code provides that culpable homicide is not murder if the offender is deprived of the power of self control by grave and sudden provocation. It is trite law that for the appellant to succeed in his defence he must show, on a balance of probabilities, that he killed the deceased while he was deprived of the power of self control by grave and sudden provocation. Under the explanation to that exception 1 it is stated that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

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[43] In *Bala Matik v. PP* [2006] 2 CLJ 229 the defence of grave and sudden provocation was argued before this court. In that case Zulkefli Makinudin JCA, after considering a number of cases on the issue, said at p. 244:

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Based on the above cited case authorities it is clear that the threshold where the appellant in the present case must satisfy the court is on the balance of probabilities that the injuries that he had inflicted on the two deceased persons were as a result of grave and sudden provocation and not merely to cast a reasonable doubt on the prosecution case ...

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[44] In *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 the Supreme Court made the following observation:

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The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v. State of Maharashtra* (7)). This test has been adopted and applied by the courts in this country

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[45] In his judgment the learned High Court judge held that he was unable to make a finding that the appellant had lost his self-control due to any grave and sudden provocation from the deceased. The learned High Court judge gave the following reasons:

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It is my finding that the relationship between Sarah and the accused was at all material times one of prostitute/client, and nothing more. Therefore, Sarah's alleged mocking laughter, at accused's attempt to commit suicide in her presence, cannot be considered provocation. Therefore, the issue of 'grave and sudden' does not arise. There is no reason for the accused to lose his self-control in an environment of prostitute/client relationship when a prostitute refuses his hand in marriage and laughs mockingly at him. There is no reason to be emotional over the rejection in such a relationship.

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- A Anger and loss of self-control, under such circumstances, is unreasonable, notwithstanding the fact the accused may have paid heavily in cash for her sexual services. The accused should have exercised the same degree of self-control as any other ordinary person, in a prostitute/client environment, and extend to the prostitute the security and assurance that no harm would befall her
- B in the course of rendering her services for the fee paid.

[46] At the end of his judgment the learned High Court judge made the following finding:

- C I am satisfied the accused stabbed Sarah in a state of self-triggered irrational anger and disillusionment over her. By no stretch of imagination can Sarah's conduct, in making known to him her stand about her relationship, be it with a mocking laughter or otherwise, be construed provocation. The injuries inflicted on Sarah by the accused were intentional, and on a balance of probability, I am
- D satisfied the accused was not deprived of any self-control, despite his assertion to that effect. In the circumstances, the defence of grave and sudden provocation cannot be availed to the accused. Since some of the injuries inflicted on her are sufficient in the ordinary cause of nature to cause death, the prosecution has proved
- E beyond reasonable doubt that the accused is guilty of the offence of murder within s. 300(c) Penal Code which reads: ...

- [47] It is also a trite law that an appellate court should be slow to disturb the finding of facts of the trial judge unless it can be shown that the finding of facts is not supported by the evidence or it is
- F against the weight of evidence or that it is a perverse finding. See *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457. On evidence in this case we agree with the finding of the learned High Court judge that the alleged provocative acts of the deceased relied upon by the defence were not capable of constituting a grave and sudden
- G provocation. The learned High Court judge had carefully evaluated the appellant evidence and made a correct finding and his finding, in our view, is clearly beyond reproach.

- [48] We have carefully scrutinised the evidence and on a
- H consideration of the entire evidence we are satisfied that the appellant was rightly convicted. For the reasons given above the appellant's appeal was accordingly dismissed and the decision of the High Court judge was affirmed.

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